

e-Competitions

Antitrust Case Laws e-Bulletin

Preview

The Turkish Competition Authority issues interim measures against a leading marketplace platform for its use of algorithms and third party data to achieve self-preferencing (*Trendyol*)

UNILATERAL PRACTICES, DOMINANCE (ABUSE), DISCRIMINATORY PRACTICES, DOMINANCE (NOTION), INVESTIGATIONS / INQUIRIES, INTERIM MEASURES, THIRD PARTIES, TURKEY, DAWN RAIDS, ANTICOMPETITIVE OBJECT / EFFECT, INTERNET, ONLINE PLATFORMS, ALGORITHMS

Turkish Competition Authority, *Trendyol*, Case 21-46/669-334, 30 September 2021 (Turkish)

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e-Competitions News Issue Preview

This case summary includes an analysis of the Turkish Competition Board's ("Board") *Trendyol Interim Measure* decision [1] in which the Board, upon the findings of its preliminary investigation, determined that DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş.'s ("Trendyol") use of algorithms and handling of third-party data were aimed at favouring its own products and discriminating between sellers on its platform, and decided to impose interim measures to address the alleged misconducts of Trendyol, as per Article 9 of the Law No. 4054 on the Protection of Competition ("Law No. 4054"), since these practices could lead to serious and irreparable damage to competition until the final decision is rendered.

Background

The Board's preliminary investigation into Trendyol's practices, largely stemming from the undertaking's dual role as a platform on one hand and a retailer on the other, has turned into an in-depth investigation to determine whether Trendyol was in violation of Article 4 (Agreements, Concerted Practices and Decisions Restricting Competition) and Article 6 (Abuse of Dominance) of Law No 4054. [2]

The Board has evaluated the findings obtained during the on-site inspections conducted within the scope of the preliminary investigation on Trendyol, and the Board's recent preliminary report concerning its sector inquiry on e-marketplace platforms [3]. As such, the Board determined that Trendyol gained significant market share in recent years within the market for multi-category marketplaces, in all categories but especially in the fashion category,

and that Trendyol is in a dominant position in the relevant market. Therefore, its practices, unless prevented, may lead to serious and irreparable damage to competition until the Board's final decision is rendered, which might take around 12 to 18 months depending on whether the Board extends the duration of the investigation.

As a result, the Board issued interim measures to prevent "the likely serious and irreparable damage" as per Law No. 4054, which allows the Board to apply interim measures to maintain the effective competition in the market.

The *Trendyol Interim Measure* has attracted great attention as it might serve as a precursor for the Board's approach towards digital markets, which has previously shown indications of getting stricter through the Board's recent decisions [4], sector inquiries [5], and efforts towards a legislation change in digital markets. However, the *Trendyol Interim Measure* is still the first instance in which the Board decided to impose interim measures in an investigation concerning algorithm-based competition law violation allegations.

The Findings Leading to Interim Measures

In its analysis of the findings from the on-site inspections conducted during the preliminary investigation, the Board found that Trendyol:

- intervenes with the algorithms to provide unfair advantage to its own products that it sells as a retailer in competition with third party sellers on its platform, and offers "next-day delivery" only for its own products,
- uses third party sellers' data obtained within scope of their marketplace activities, to create and shape a marketing/design strategy that favours Trendyol's own retailing activities,
- discriminates between sellers in the marketplace by interfering with the algorithms and creating a lack of transparency concerning the sponsored products.

The Board analyzed the conducts provided under (i) and (ii) above by relying on the "self-preferencing" concept which has been at the core of the allegations scrutinized in recent Board decisions concerning digital markets, whereas the allegation under (iii) was evaluated under the concept of "discrimination."

With regards to self-preferencing behavior, the Board indicated that this concept has come into play with the development of digital markets, and can be defined as the dominant undertakings' preferential treatment towards their own products and services when they are in competition with third party products/services on the same platform. The Board notes that the reason behind the anti-competitive concern created by self-preferencing is the dominant undertaking's leveraging of market power in the related markets and thereby creating unfair competitive advantage for itself in those markets.

The Board considered the documents obtained through the searches on the Trendyol's algorithms and systems, which revealed that Trendyol has manipulated the actual data on its platform by intervening in the algorithms and codes in order to favour its own products and services, and thereby has misled sellers and users on its platform. In that respect, Trendyol was found to have artificially increased the number of followers, erased low user scores for Trendyol branded products, and furthermore, alleged to have listed its own brands at the top in brand filters.

With regards to the use of third party data monitored and obtained via their marketplace activities, the Board underlined the risk of copycatting, where Trendyol would be able to detect the profitable and popular products/services and offer the same products/services without exposing itself to commercial risk, or incurring the costs that third party sellers had to face to launch the concerned product/services. The Board considers this to be a self-preferencing behaviour, and claims that this might not only discourage innovation efforts of third party sellers but also enable Trendyol to free-ride on these sellers' efforts and data. The Board also drew attention to Trendyol's ability to offer even lower prices when Trendyol's economies of scale and scope are taken into consideration, which increases the disadvantage for third party sellers.

With respect to the discrimination allegation, the Board put forward that Trendyol can manipulate the sorting and place any seller it wishes at the top of sorting lists, by way of interfering with the listing algorithms, as well as creating exceptions for certain sellers. Furthermore the Board assessed that there is lack of transparency on Trendyol's platform regarding the rules concerning the listing of sponsored products.

Lastly, by referring to its findings under the preliminary sector inquiry report on e-marketplace platforms, the Board determined that Trendyol holds the dominant position in the market for multi-category marketplace platforms.

Interim Measures Issued

Upon the findings provided above, the Board decided that Trendyol shall:

- Cease all kinds of actions, behaviour and practices which provide it with an advantage against its competitors, including the algorithms and coding interventions to other products and services within the context of the marketplace activity; and avoid such actions during the investigation,
- Stop sharing and using any kind of data obtained and produced from the marketplace activity for other products and services under its economic integrity, and avoid such actions during the investigation,
- Cease all kinds of actions, behaviour and practices, which may discriminate among the sellers in the marketplace; including those interventions made through algorithms and coding, and avoid such actions during the investigation,
- Take all necessary technical, administrative and organizational measures to ensure the auditability of the above-listed interim measures,
- Retain the data pertaining to all of the parametric and structural changes made on all algorithm models used for product search, seller listing, seller score calculation, etc. within Trendyol, including all versions and with irrefutable accuracy, for at least 8 (eight) years,
- Retain the source codes of all software that has been specifically developed for use within Trendyol, including all versions and with irrefutable accuracy, for at least 8 (eight) years, and
- Retain the user access and authorization records and manager audit records for all software used within the scope of the business activities being conducted within Trendyol, with irrefutable accuracy, for at least 8 (eight) years.

Conclusion

The *Trendyol Interim Measure* decision is of particular importance as it demonstrates the Board's approach towards the algorithm-based markets, which is a signal that the Board is following the recent developments in the sector very closely. The decision also indicates that the Board will not hesitate to impose interim measures, where necessary, with a view to maintain the effective competition in such dynamic markets.

[1] The Turkish Competition Board's Trendyol Interim Measure decision dated 30.09.2021 and numbered 21-46/669-334

[2] The Turkish Competition Board's decision dated 23.09.2021 and numbered 21-44/650-M.

[3] The Turkish Competition Authority, "e-Pazaryeri Platformları Sektör İncelemesi Önerisi" ("e-Marketplace Platforms Sector Inquiry Preliminary Report"), April 2021 (Available at: <https://www.rekabet.gov.tr/Dosya/sektor-raporlari/e-pazaryeri-si-on-rapor-20210705115502897-pdf>)

[4] The Turkish Competition Board's decisions dated 12.11.2020 and numbered 20-49/675-295; dated 07.11.2019 and numbered 19-38/575-243; dated 19.09.2018 and numbered 18-33/555-273; dated 18.09.2017 and numbered 17-11/127-56; dated 20.01.2017 and numbered 16-20/332-151; dated 16.01.2017 and numbered 16-17/286-129; dated 21.03.2016 and numbered 15-46/766-281.

[5] The Turkish Competition Authority, Press Release, "Rekabet Kurulu Çevrimiçi Reklamcılık Sektörüne Yönelik Sektör İncelemesi Başlattı" ("The Turkish Competition Board Has Initiated a Sector Inquiry on the Online Advertisement Sector") (Available at: <https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurulu-cevrim-ici-reklamcilik-se-aa233ec4677eeb11812c00505694b4c6>).